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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, ALSO KNOWN AS WILLIAM NIUKKANEN, ALSO KNOWN AS WILLIAM ALBERT MACKIE, PETITIONER

v.

EUGENE D. MCALEXANDER, ACTING DISTRICT DIRECTOR, DISTRICT 31, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13–22; R. 93–100)[1] is reported at 265 F. 2d 825. The oral opinion of the district court (R. 77–79, 81–86) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1959 (Pet. 23; R. 101). A petition for

[1] The designation "R." refers to the printed transcript of record. "Tr." refers to the transcript of testimony in the deportation proceeding which has been filed as an exhibit with the printed record.

rehearing was denied on May 19, 1959 (R. 102). The petition for a writ of certiorari was filed on June 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's deportation hearing was sufficient to establish that his membership in the Communist Party was a "meaningful association" as required by the decision of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115.

2. Whether the statute requiring the deportation of an alien because of membership in the Communist Party after entry, even though prior to the enactment of the statute, is unconstitutional as an *ex post facto* law or a bill of attainder.

STATUTE INVOLVED

The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provided in pertinent part:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *.
>
> * * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[2]

* * * * *

[2] These provisions are now incorporated in Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251), which reads in pertinent part:

(a) General classes.

Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

(d) Applicability to all aliens.

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952.

* * * * *

STATEMENT

Petitioner, a native and citizen of Finland, seeks review of the judgment of the court of appeals affirming a judgment of the District Court for the District of Oregon. The district court had denied petitioner relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (*supra*, pp. 2–3).

1. On June 17, 1952, the District Director of the Immigration and Naturalization Service issued a warrant of arrest which recited that petitioner, who had entered this country on September 5, 1909, had been, after entry, a member of the Communist Party and was therefore subject to deportation (R. 5).[3] The warrant was served on September 12, 1952 (R. 5), and hearings were held before a Special Inquiry Officer on May 11 and May 21, 1953 (R. 19). On June 30, 1953, the Special Inquiry Officer specifically found that petitioner had been a member of the Communist Party during the years 1937 to 1939 and ordered his deportation (R. 17–18, 22–23, 47, 83, 95).

On petitioner's appeal from this order, the Board of Immigration Appeals found that the record estab-

[3] Since the Immigration and Nationality Act of 1952 was not enacted until later in June, 1952, the warrant of arrest (and hence the proceedings as a whole) were instituted under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950.

lished the ground of deportability by reasonable, substantial, and probative evidence and accordingly dismissed the appeal on September 8, 1953 (R. 17–18, 83, 95).

On November 11, 1954, petitioner moved to reopen the proceeding in order that he might apply for suspension of deportation. This motion was denied on November 29, 1954, but, after being renewed, was granted on December 23, 1954 (R. 17–18, 84). On February 16, 1955, after a hearing, a Special Inquiry Officer denied petitioner's application for suspension of deportation, finding that he had not made a "clean break" with the Communist Party and that there was reason to believe that he was still sympathetic with its principles. The Board of Immigration Appeals affirmed this order on May 13, 1955 (R. 17–23, 84).

While his application for suspension of deportation was pending, petitioner, on December 13, 1954, petitioned the district court for a writ of habeas corpus alleging that the evidence against him did not support the order of deportation and that the statute under which the order was issued was unconstitutional. After the order denying suspension of deportation was entered by the Special Inquiry Officer on February 16, 1955, the petition for a writ of habeas corpus was amended to include the additional argument that the denial of suspension was arbitrary and capricious (R. 84, 95–96).

The district court, after a hearing, denied the petition on March 2, 1956 (R. 84). *Niukkanen* v. *Boyd*, 148 F. Supp. 106 (D. Ore.). On February 8, 1957, the court of appeals affirmed. *Niukkanen* v. *Boyd*,

241 F. 2d 938 (C.A. 9). A petition for a writ of certiorari was denied on December 16, 1957. 355 U.S. 905.

On December 27, 1957, on the basis of this Court's decision of December 9, 1957, in *Rowoldt* v. *Perfetto*, 355 U.S. 115, petitioner sought administrative reconsideration of his status as a deportable alien. He claimed that the *Rowoldt* decision "so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens." This motion was denied by the Board of Immigration Appeals on March 26, 1958 (R. 9; see also R. 85). Relying on this same ground, and renewing his contention that the statute is unconstitutional, petitioner instituted the instant proceeding in the district court on April 4, 1958 (R. 3–16). After a hearing (R. 46–77), the district court denied the petition on April 14, 1958 (R. 77–79, 81–86).

2. At the original administrative hearing held in May 1953, petitioner was called to the stand and answered general questions relative to his age, parentage, residence, etc. The government then called two witnesses, Wilmot and Knipe, who had themselves been active card-carrying members of a Portland, Oregon, section of the Communist Party during the years 1937 to 1939. Both of these witnesses testified that petitioner was a card-carrying member of the Party during this period. Both said they saw petitioner pay his dues at a Party office and receive stamps to be affixed in his membership book, which they also saw (Tr. 14–15, 46, 69).

Wilmot, who was at the time the editor of the Labor New Dealer in Oregon, which was "Communist set-up and controlled," testified that petitioner came to his office once or twice a month to obtain copies of the paper for distribution (Tr. 15, 17, 19–20). In a back room of the office, closed to non-Party members, petitioner would, during these visits, gather with Party members and actively participate in discussions pertaining to Party policies and the circulation of the paper as a Party organ (Tr. 20–22). Wilmot saw petitioner at many closed Party meetings in Portland (Tr. 15, 17) and at an out-of-state "plenum," a meeting held for the purpose of reporting regional activities of the Party. Admission was by card only and petitioner was known at the meeting (Tr. 26). In Wilmot's opinion, petitioner belonged to the "top-fraction" in this area and "knew where he was going" (Tr. 27, 32).

Knipe testified that he saw petitioner at from thirty to thirty-five closed meetings (Tr. 67) and that petitioner took an active part in discussions (Tr. 67). He said that petitioner served on the executive board of the area branch (Tr. 68).

At the conclusion of this testimony, petitioner declined to take the stand, although the disadvantage of his remaining silent was called to his attention by the Special Inquiry Officer (R. 67). At later hearings on the motion for suspension of deportation and in the district court, petitioner denied that he had ever knowingly been a member of the Communist Party (R. 19–21, 54).

ARGUMENT

In its oral opinion rejecting this second attack on the order for petitioner's deportation, the district court reviewed the prior proceedings in this matter, including this Court's denial of petitioner's earlier petition for a writ of certiorari only a week after its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and aptly observed that "Almost six [now seven] years have elapsed since the warrant was served upon the Petitioner, and the delay * * * has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit" (R. 85). See also the opinion of the court of appeals (Pet. 14–17; 265 F. 2d at 826–827). We submit that the contentions in this proceeding, which had previously been decided against petitioner, are no more meritorious now than when they were first before this Court in *Niukkanen* v. *Boyd*, No. 992, O.T. 1956, renumbered No. 121, O.T. 1957.

1. The original argument of the *Rowoldt* case in this Court was heard in November 1956. The petition in No. 992, O.T. 1956, urging that the proof showed that petitioner was merely a nominal member of the Communist Party within the exception noted by this Court in its earlier decision in *Galvan* v. *Press*, 347 U.S. 522, 529, was filed on May 13, 1957. In its brief in opposition, the government argued that the evidence established that petitioner was "a card-carrying, dues-paying member of the Party, one of the 'top fraction' of his branch" (p. 6), but suggested that the Court might wish to defer action on the petition until it had decided *Rowoldt*. *Rowoldt* was reargued in

October 1957, and decided on December 9, 1957. 355 U.S. 115. Niukkanen's petition was denied on December 16, 1957. 355 U.S. 905.

No new evidence on the question of deportability under the principles of *Galvan* and *Rowoldt* has been adduced. There is thus no occasion for further review of the administrative record which was previously before this Court and which has now twice been reviewed by the Board of Immigration Appeals and the courts below on the issue of its sufficiency to support the deportation order. In any event, the evidence of petitioner's active Party activities introduced at the deportation hearing (*supra,* pp. 6–7) clearly satisfies the standard of "meaningful association" prescribed by *Rowoldt.* See the careful comparison by the court of appeals of the evidence in *Rowoldt* and in the instant case (Pet. 19–22; 265 F. 2d at 828–829).

2. While conceding (Pet. 5) that this Court has, in the *Galvan* case, *supra,* and in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, sustained the statute in question against the argument that it is an *ex post facto* law, petitioner claims that the Court has not passed on his contention that it is invalid as a bill of attainder (Pet. 5–9). Both of these contentions were also urged without success in his prior petition.

In the *Galvan* case the statute was attacked on both grounds. The contention that the statute is a bill of attainder, as well as an *ex post facto* law, was briefed at length (see No. 407, Oct. Term, 1953, Brief for Petitioner, pp. 53–57; Brief for Respondent, pp. 63–66), and the petitioner there relied on the same inapposite

cases which petitioner invokes here.[4] While the Court did not expressly mention the bill of attainder clause in its decision, the holding in *Galvan*, like that previously in *Harisiades*—that a statute providing for deportation for past membership in the Communist Party (even though the alien might have been unaware of the party's advocacy of violence) does not offend the *ex post facto* clause, or due process generally—is dispositive as well of the contention that it is a bill of attainder. Only punitive legislation falls within the constitutional prohibitions against both *ex post facto* laws (*Galvan, supra*, 347 U.S. at 531; *Harisiades, supra*, 342 U.S. at 594) and bills of attainder (*United States* v. *Lovett*, 328 U.S. 303, 315, 321–324). Since "the unbroken rule of this Court that [the *ex post facto* clause] has no application to deportation" is based on the conclusion that deportation is not punishment (*Galvan, supra*, 347 U.S. at 531[5]), it follows that the bill of attainder clause is equally inapplicable.

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[4] *United States* v. *Lovett*, 328 U.S. 303; *Ex parte Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234; *Cummings* v. *Missouri*, 4 Wall. 277.

[5] In the *Harisiades* case (342 U.S. at 595) this Court referred to the *Garland*, *Cummings*, and *Pierce* cases, *supra*, in regard to the contention that in those cases the *ex post facto* clause had been applied to what appeared to be civil disabilities: "The Court has since explained that those cases proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise. *Burgess* v. *Salmon*, 97 U.S. 381, 385. Those cases were known to the Justices who promulgated the above-quoted opinions [in the deportation cases of *Bugajewitz* v. *Adams*, 228 U.S. 585, and *Mahler* v. *Eby*, 264 U.S. 32] but have never been considered to govern deportation." See also *Lehman* v. *Carson*, 353 U.S. 685; *Mulcahey* v. *Catalanotte*, 353 U.S. 692; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bugajewitz* v. *Adams*, 228 U.S. at 591.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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